

IN THE FIRST CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

INNOVATION VENTURES, LLC,)
38955 Hills Tech Drive)
Farmington Hills, Michigan 48331)

LIVING ESSENTIALS, LLC)
38955 Hills Tech Drive)
Farmington Hills, Michigan 48331)

and)

MICRODOSE SALES, LLC)
26600 Haggerty Road)
Farmington Hills, Michigan 48331,)

Plaintiffs,)

v.)

TENNESSEE DEPARTMENT OF)
COMMERCE AND INSURANCE, *ex rel.*)
ATTORNEY GENERAL AND)
REPORTER, ROBERT E. COOPER, JR.)

Defendant.)

Case No. 13-858-I

Amended (B)
ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

The Defendant, the Tennessee Department of Commerce and Insurance, *ex rel.* the Attorney General and Reporter of Tennessee, Robert E. Cooper, Jr. has moved to dismiss the Plaintiffs' action with prejudice pursuant to Tennessee Rule of Civil Procedure 12.02(6) on the grounds that the complaint fails to state a claim upon which relief can be granted.

Following a hearing on August 16, 2013, the Defendant's Motion to Dismiss is **GRANTED** for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. A Request for Consumer Protection Information (“Request”) is an investigative subpoena issued under the Tennessee Consumer Protection Act (“TCPA”). *See* Tenn. Code Ann. § 47-18-106.

2. The objection mechanism to a Request under the TCPA is set forth in Tennessee Code Annotated § 47-18-106(b).

3. The action is before the court following the issuance of a Request on January 23, 2013. Compl. at para. 6.

4. The Plaintiffs did not petition the circuit or chancery courts of Davidson County for a protective order to extend the return date for a reasonable time, or to modify or set aside the request within ten days of notice of the request.

5. The Request issued January 23, 2013, contained Request #31, which stated:

Provide all correspondence between You and the National Advertising Division [“NAD”] of the Council of Better Business Bureaus that refer or relate to a ‘crash’ following use of 5-hour ENERGY.

Compl. at para. 10.

6. “In response to this request, [Plaintiffs] produced copies of materials provided to the NAD in 2007 in connection with a self-regulatory proceeding. . . .These materials included a cover letter and a scientific review (‘Literature Review’) that referenced the amounts of specific ingredients related to the 5-hour ENERGY® products.” Compl. at para. 11.

7. Plaintiffs refused to produce unredacted copies of the “Literature Review” to the State with the specific ingredient amount listed—instead providing copies of the “Literature Review” with the specific ingredient amounts redacted. *See* Compl. at paras. 11, 14.

8. After the State indicated it would seek to compel production of the unredacted documents, *see* Compl. at para. 15, Plaintiffs filed their Complaint, which sought a “declaratory judgment and protective order to protect one of their most valuable assets from unwarranted risk of exposure.” Compl. at 2. Plaintiffs filed their action on June 13, 2013,—141 days after service of the Request.

9. A motion to dismiss tests the legal sufficiency of the claim, not the strength of the plaintiff’s proof, and the court should construe all facts in the complaint in favor of the plaintiff, taking the relevant and material allegations as true. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997). “A trial court should grant a motion to dismiss only when it appears that the plaintiff can prove no set of facts which would entitle him to relief.” *State ex rel. Moncier v. Jones*, No. M2012-01429-COA-R3-CV, 2013 WL 2492648, at *2 (Tenn. Ct. App. June 6, 2013).

10. In the Plaintiffs’ Demand for Relief contained in its Complaint, the Plaintiffs’ seek:

1. A declaration that information relating to specific amounts of ingredients in 5-hour ENERGY® products is a trade secret;
2. A declaration that the Attorney General is not entitled to disclosure of the specific amounts of the ingredients in 5-hour ENERGY® products;
3. Injunctive relief in the form of a protective order providing that plaintiffs are not required to provide information regarding the specific amounts of ingredients in 5-hour ENERGY® products to the Attorney General; and
4. An order granting such other and further relief as the Court may deem just and proper.

Compl. at 7-8.

11. The relief that the Plaintiffs seek in their Complaint is, in substance, an attempt to modify or set aside the State’s Request, which is time-barred by Tennessee Code Annotated §

47-18-106(b). Because the Plaintiffs did not assert their objections to the Request within ten days, *the request for a protective order brought as a declaratory judgment action must be dismissed.* ~~they have waived their objections. Tennessee Code Annotated § 47-18-106(b) is the exclusive statutory remedy to lodge objections to investigative subpoenas under the TCPA.~~

12. The Court reaches these conclusions based on the text of the TCPA, the legislative intent set forth in the TCPA, and canons of statutory construction.

13. Tenn. Code Ann. § 47-18-106(b) states:

At any time prior to the return date specified in the division's request for information pursuant to [Tenn. Code Ann. § 47-18-106(a)], or within ten (10) days following notice of such a request, whichever is shorter, any person from whom information has been requested may petition the circuit or chancery court of Davidson County, stating good cause, for a protective order to extend the return date for a reasonable time, or to modify or set aside the request.

(emphasis added).

14. A "basic rule of statutory construction [p]rovides that a general statute concerning a subject must defer to a more specific statute concerning the same subject." *Five Star Exp., Inc. v. Davis*, 866 S.W.2d 944, 946 (Tenn. 1993). While Tennessee Rule of Civil Procedure 26.03, which Plaintiffs invoke in their Complaint, generally provides the ability to obtain protective orders, the TCPA's ten day objection window, Tenn. Code Ann. § 47-18-106(b), is the more specific statute concerning the mechanism for protective orders in the face of an investigative subpoena under the TCPA.

15. Under canons of statutory construction, courts "presume that every word in the statute has meaning and purpose and should be given full effect if the obvious intent of the General Assembly is not violated by so doing." *State v. Marshall*, 319 S.W.3d 558, 561 (Tenn. 2010). Here, the reference to ten days would have no meaning if subpoenaed entities maintained the ability to file for a protective order or more to modify a subpoena after this period.

The Court agrees with the Plaintiff that the ten day window is harsh but the time 4 limit supports the purpose of the legislation. S. B. Jones

16. In addition, in considering the TCPA's ten day objection window, under fundamental canons of statutory construction, "[t]he reasonableness of a statute may not be questioned by a court, and a court may not substitute its own policy judgments for those of the legislature." *Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000). Plaintiffs arguments as to the harshness of the ten day period essentially ask the court to assess the reasonableness of the statute in contravention of this rule of statutory construction.

17. Moreover, the General Assembly has expressed its intent under the TCPA in Tennessee Code Annotated § 47-18-102, four of which support the legal conclusions above.

18. The TCPA states, in relevant part:

The provisions of this part shall be liberally construed to promote the following policies:

(1) To simply, clarify, and modernize state law governing the protection of the consuming public and to conform these laws with existing consumer protection policies;

(2) To protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state;

(3) To encourage and promote the development of fair consumer practices; [and]

(4) To declare and provide for civil legal means for maintaining ethical standards of dealing between persons engaged in business and the consuming public to the end that good faith dealings between buyers and sellers at all levels of commerce be had in this state . . .

19. A holding that the TCPA's ten day objection window is the exclusive statutory remedy to ^{bring an action for a protective order to (KB)} modify or set aside an investigative subpoena under the TCPA ~~and that a subpoenaed entity's failure to make objections within this time period waives the objections~~ is dictated by the TCPA's legislative intent mentioned above including to "simply, clarify, and modernize" state consumer protection law and "to declare and provide for [its] civil legal means."

20. Further, the TCPA through Tennessee Code Annotated § 47-18-106(g) clearly shows that the State is able to seek sensitive information, including trade secrets, as part of a state enforcement investigation. *This order does not address defenses which the Plaintiff may assert in an enforcement action. (CB)*

21. Because there are no set of facts that would entitle Plaintiffs to the relief they seek in their Complaint, the State's Motion to Dismiss is granted.

ORDER

IT IS SO ORDERED that the Plaintiffs' action is dismissed with prejudice; and

IT IS SO FURTHER ORDERED no costs are taxed against the State of Tennessee.



CHANCELLOR CLAUDIA BONNYMAN
First Chancery Court, Twentieth Judicial District

Respectfully submitted,

ROBERT E. COOPER, JR.

Attorney General and Reporter

B.P.R. No. 10934

A handwritten signature in cursive script, reading "Brant Harrell", positioned above a horizontal line.

BRANT HARRELL, B.P.R. No. 24470

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CERTIFICATE OF SERVICE

I, Brant Harrell, certify that on the 20th day of August, 2013, the above-referenced document was served as follows:

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BRANT HARRELL

MAILED
9/24/13